

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KEVIN HOWARD SMITH,

Appellant.

No. 38092-7-II

UNPUBLISHED OPINION

Penoyar, A.C.J. — Kevin Howard Smith appeals his third degree theft and second degree possession of stolen property convictions. He argues that (1) insufficient evidence supported the convictions, (2) he received ineffective assistance of counsel because his counsel failed to object to the admission of digital and video recordings, and (3) the trial court erred by denying his motion for mistrial based on juror unfitness and misconduct. We affirm.

FACTS

On May 9, 2006, gas station owner Dewayne Schroeder observed three cars pull into his Tacoma gas station and park at three different pumps. Schroeder watched Smith¹ exit one of the

¹ At trial, Schroeder identified Smith as the purchaser:

Q: Do you recognize anyone in this courtroom associated with this transaction?

A: Well, I haven't taken a good look around at the jury or anything, but, yeah, I do recognize the young man at the table.

Q: And how do you recognize him?

A: Well, because I got a pretty good look at him when he was out there at the fuel islands and, you know like I said, I actually like walked out to the vehicles and was writing down license plates and descriptions of the vehicles . . . I just recognize him. Hair -- well, he's had a haircut since, it was a little fuller back then.

Q: And, for the record, are you identifying the individual sitting next to [defense counsel]?

A: Yes, to the left of [defense counsel], yeah.

Q: Is that individual, the defendant in this case, the person that you saw on May 9th with the possession of the credit card?

A: I think so, yeah.

cars. Smith's car had a 598 KDY license plate. Smith used a card that he removed from his "left front pocket" to buy gasoline for each car.² 2 Report of Proceedings (RP) at 44. Schroeder's credit card authorization machine revealed that Smith used a "Voyager fleet credit card," a type of card that the federal government issues to its agencies to purchase gasoline. 2 RP at 62. Because Schroeder thought the cars "[didn't] look like [g]overnment vehicles," he walked outside and wrote down license plate numbers and vehicle descriptions. 2 RP at 40.

Schroeder gave the license plate numbers, vehicle descriptions and transaction receipts to Christopher Bjornstad, United States General Services Administration (GSA) special agent. Bjornstad determined that Smith owned a 1999 Buick sedan with license plate number 598 KDY. Bjornstad noted that Smith had purchased the gasoline at Schroeder's station with a Voyager credit card ending in 9836, which had been removed without permission from a locked file cabinet on the Bangor, Washington naval base. Bjornstad confirmed that the vehicles Smith fueled were not government vehicles.

On June 2, 2006, Bjornstad followed Smith's Buick sedan. He photographed the sedan, which had tinted windows, and "unique damage [to] . . . [the] left driver's quarter panel or trunk area taillight area." 2 RP at 102-03. At about 5:55 p.m., the Buick's female driver picked Smith up from a residence and drove to a Shell station at 1401 South Sprague in Tacoma, where she parked at gas pump 8. Smith exited the car and walked to a car parked at pump 4. Bjornstad testified that Smith "access[ed] the panel of the pump where the key pad was, where you would

2 Report of Proceedings (RP) at 45-46.

² The Voyager card's "security features" did not authorize Smith's third purchase. 2 RP at 39. The driver of the third car entered the store to pay Schroeder.

punch in numbers for an access device,” removed the nozzle and began to fuel the car at pump 4.³ 2 RP at 113-14. The station recorded a Voyager credit card transaction.

Bjornstad searched a GSA database for other transactions involving the same Voyager credit card and discovered more suspicious gasoline purchases.⁴ Bjornstad visited the Tacoma stations where these transactions had occurred and obtained surveillance recordings from the employees. During his investigation, Bjornstad converted or edited some of these recordings in order to make them easier to review.⁵ At trial, the State played several of these recordings for the jury, including: (1) a digital recording showing two transactions on May 9, 2006 at Schroeder’s gas station; (2) a digital recording showing two transactions on May 17, 2006 at a Shell gas station at 1430 72nd Street East;⁶ (3) a digital recording showing a May 23, 2006 transaction at a Shell station at 5610 Orchard Street West; (4) a digital recording showing a May 28, 2006 transaction at a Shell station at 5610 Orchard Street West; (5) a VHS tape showing a June 2, 2006 transaction at a Shell station at 1401 South Sprague Avenue, and (6) a digital recording

³ Bjornstad recorded his surveillance video on “a digital cassette tape, a mini –DV tape” and later transferred it to DVD without modifying it. RP at 135, 114, 133. The jury watched the DVD.

⁴ A Voyager credit card may only be used to fuel a specific vehicle, and the driver must enter the odometer reading at the pump. Bjornstad noticed several transactions where multiple fuelings had occurred on one day with an odometer reading of zero, both of which are indicators of misuse.

⁵ Specifically, Bjornstad converted exhibit 3 from VHS format to DVD format (exhibit 6), a process that “compressed” the images but did not modify the videotape’s contents. RP at 85. For exhibits 7, 12 and 13, Bjornstad accessed the gas stations’ on-site surveillance recording system and copied only those portions of the surveillance tapes to compact disc that pertained to time when the suspicious transactions occurred. Bjornstad apparently did not convert or edit exhibits 15 and 19.

⁶ An employee involved in the May 17, 2006 transaction wrote down the license plate 598 KDY.

showing a June 4, 2006 transaction at a Shell station at 3740 Pacific Avenue East.⁷

Except for the May 9 transaction at Schroeder's station, Bjornstad identified the presence of Smith's 1999 Buick sedan in each of the above recordings based on the vehicle's unique characteristics, including its overall shape, color, custom wheels, tinted windows, "raised trunk," and "damage to the rear of the vehicle." 2 RP at 124; 3 RP at 169. However, Bjornstad could not identify facial features or license plate numbers in the recordings. The gasoline purchases from these eight recorded transactions totaled \$330.12

The State charged Smith by amended information with second degree theft (count I) and second degree possession of stolen property (count II). Trial occurred on July 23 and 24, 2008.⁸ Jury deliberations began on the afternoon of July 24.

On the morning of July 25, juror 9 told the trial court's judicial assistant that "her conscience was bothering her" but that she would continue to deliberate. 4 RP at 267-68. Later, juror 9 asked to speak to the court, which interviewed her in the presence of counsel:

THE COURT: And clearly as you're sitting before me, you look like you've had some emotional issues --

JUROR NO. 9: Yeah.

THE COURT: That have to do with this case. So if you can, can you tell us what they're about?

JUROR NO. 9: Yeah, I think in a nutshell I can. What I'm trying to avoid truthfully is a situation of a hung jury because, you know, I had -- when I took that oath, I felt I would be able to do this. I guess my feelings on coming to the -- a

⁷ The State also introduced photographs of three May 2006 transactions that Bjornstad had obtained involving the Voyager credit card at the Shell station at 1401 South Sprague Avenue. Bjornstad testified that he did not have "the same degree of certainty" when identifying Smith's car in the photographs as compared to the recordings. 3 RP at 172.

⁸ The State called three witnesses: Schroeder, Bjornstad and Stanley Larive, a former supply officer at the Bangor naval base who managed the Voyager credit cards. The defense called no witnesses.

verdict changed after watching the proceedings.

THE COURT: Let me stop you . . . for a minute. I do not want you to reflect in any way . . . what your decision might be in this case . . . or what any of the other jurors [think] . . . That is not appropriate and I don't want to hear that. All I want to know is ultimately . . . Can you . . . consider the Court's instructions on the law and deliberate in a fair and impartial manner. Can you do that?

JUROR NO. 9: I can deliberate fairly and impartially . . . my concern . . . is I am pretty certain that there would be a hung jury and that's my -- and I just -- I guess I can't say anything else. So I can go in and deliberate my position. I don't have a problem with my position and I don't have a problem articulating it.

4 RP at 270-72. During this exchange, juror 9 also said that nothing had happened outside of the courtroom to prevent her from deliberating fairly and impartially. The trial court told juror 9 to re-read instruction number one⁹ before returning to deliberate.

Later in the day, the jury summoned the judicial assistant to the jury room. Juror 5, the presiding juror, told the judicial assistant that juror 9 was "not willing to go any further with deliberations." 4 RP at 296. The judicial assistant took juror 9 into the hallway to speak with her privately. Juror 9 stated that she was "being pressured" because she did not agree with the rest of the jury, and she asked to be replaced. 4 RP at 296. The judicial assistant told juror 9 that "her views are her views" and that not everyone has the same point of view. 4 RP at 296. Juror 9 returned to the jury room and the jury adjourned "seconds later" for the weekend. 4 RP at 297.

Defense counsel moved for a mistrial because juror 9 felt pressured. The trial court denied the motion, stating:

This is not an unusual situation. What is unusual about this situation is that the juror continues to voice these concerns to staff and to the Court and to counsel . . . it's, I think, highly unusual for them to bring to our attention or suggest that she be replaced.^[10] Being biased or prejudiced is one thing, but having some strong

⁹ Instruction number one was an introductory instruction from the Washington pattern jury instructions. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 1.02, at 13-16 (3d ed. 2008).

conviction that others don't agree with is not. That's our jury system and so I'm going to ask that [the jury] continue to deliberate.

4 RP at 298.

After the weekend break, the jury acquitted Smith of second degree theft, but convicted him of third degree theft and second degree possession of stolen property. The trial court sentenced Smith to 30 days for possession of stolen property and to a one year suspended sentence for third degree theft. Smith now appeals.

ANALYSIS

I. Sufficiency of Evidence

A. Standard of Review

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). We interpret all reasonable inferences in the State's favor. *Hosier*, 157 Wn.2d at 8. Circumstantial evidence is no less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the fact finder on issues that involve conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Cantu*, 156 Wn.2d 819, 830-31, 132 P.3d 725 (2006).

¹⁰ According to the record, the jury did not suggest that juror 9 be replaced. Rather, juror 9 asked to be replaced.

B. Third Degree Theft¹¹

A person commits third degree theft by intending to deprive another person of property or services not exceeding \$250. Former RCW 9A.56.050 (Laws of 1998, ch. 236, § 4); RCW 9A.56.020(1). The State must establish beyond a reasonable doubt the identity of the accused as the person who committed the offense. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). Identity is a question of fact for the jury. *Hill*, 83 Wn.2d at 560.

Smith contends that the State failed to prove the “essential element of identity” on the theft charge. Appellant’s Br. at 9. This argument fails because the State presented direct eyewitness evidence that Smith purchased gasoline with the stolen Voyager card. Schroeder identified Smith as the individual who bought gasoline at his station on May 9, 2006 with the stolen card.¹² Bjornstad observed Smith drive to a gas station on June 2, 2006 and put gasoline into another vehicle after “access[ing] the panel of the pump . . . where you would punch in numbers for an access device.” 2 RP at 113-14. Smith used the stolen Voyager card for the transaction. In addition to this direct evidence, Bjornstad identified Smith’s car as being present at eight other transactions with the stolen credit card. When viewed in the light most favorable to the State, this evidence supports Smith’s theft conviction.

¹¹ In his brief, Smith challenges the sufficiency of evidence for a second degree theft conviction. However, the jury convicted Smith of third degree theft, not second degree theft. We address Smith’s contentions as a challenge to his third degree theft conviction. Thus, we do not address Smith’s assigned error that the State failed to prove that his theft exceeded \$250 since that is not an element of third degree theft. Former RCW 9A.56.050.

¹² The record does not support Smith’s assertion that Schroeder “was unable to positively identify Mr. Smith as the man who used the Voyager credit card to pay for fuel at his gas station on May 9, 2006.” Appellant’s Br. at 13-14.

C. Second Degree Stolen Property

A person commits second degree possession of stolen property by possessing a stolen access device, such as a credit card. Former RCW 9A.56.160(1)(c) (Laws of 1995, ch. 129, § 15); RCW 9A.56.010(1). Possession of property may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item. *Callahan*, 77 Wn.2d at 29.

Smith argues that the State failed to prove the elements of possession of stolen property and identity with regard to his second degree stolen property conviction. This argument also fails. A Navy supply officer testified that the Voyager credit card ending in 9836¹³ had been taken from a locked file cabinet on the Bangor base. Schroeder observed Smith in actual possession of the card, noting that he removed a card from his “left front pocket” to make an unauthorized gas purchase. 2 RP at 44. The receipts from Schroeder’s store indicated that Smith used the Voyager credit card ending in 9836. When viewed in the light most favorable to the State, these facts support Smith’s possession of stolen property conviction.¹⁴

¹³ The supply officer, Stanley Larive, never identified the Voyager credit card by number. However, on cross-examination, the defense asked whether there were two cards missing from the file cabinet, “[t]he one we’re dealing with here and then one that’s completely separate?” Larive replied, “Yes, sir.” 3 RP at 156.

¹⁴ Bjornstad’s testimony, which placed Smith’s car at several gas stations where other unauthorized credit card transactions occurred, also supports a theory that Smith constructively possessed the card.

II. Ineffective Assistance of Counsel

A. Standard of Review

The federal and state constitutions guarantee the effective assistance of counsel. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant must overcome a strong presumption that counsel was effective. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To establish ineffective assistance of counsel, a defendant must show that (1) counsel’s performance was deficient by an objective standard of reasonableness, and (2) that the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687-88; *McFarland*, 127 Wn.2d at 334-35.

B. Video and Digital Recordings

Smith argues that he received ineffective assistance because his counsel failed to object to the admission of digital and video evidence. Smith asserts that, had defense counsel objected, the trial court would have excluded this evidence because the State did not establish the necessary foundation or chain of custody to admit this evidence. Smith cannot show deficient performance because the trial court properly admitted the State’s digital and video recordings.

Washington Rule of Evidence (ER) 901 requires a party to provide sufficient evidence to support a finding that “the matter in question”—here, the video and digital recordings—is what the proponent claims it to be. A videotape is authenticated by testimony establishing that the video is a fair and accurate representation of what is portrayed. *See State v. Newman*, 4 Wn. App. 588, 593, 484 P.2d 473 (1971); *see also State v. Early*, 36 Wn. App. 215, 222-23, 674 P.2d 179 (1983) (stating that a videotape of a supermarket robbery was properly authenticated by the

testimony of the officer who took it into possession).¹⁵

Here, Bjornstad properly authenticated the video contents and digital recordings by testifying in detail as to when, where, and under what circumstances the surveillance recordings were made. Bjornstad described how he obtained the recordings from gas station employees. He recounted how he used the transaction times from the GSA database to find surveillance footage of the pertinent transactions on the tapes. Bjornstad explained the changes he made to the originals, such as reformatting them and leaving out irrelevant portions. The State therefore offered sufficient evidence to authenticate the recordings.

Smith correctly points out that the State elicited little chain of custody testimony from Bjornstad or any other witness to demonstrate that the video and digital recordings were in a “secure location” prior to trial.¹⁶ Appellant’s Br. at 27. However, Bjornstad identified all of the recordings as those he had acquired from gas station employees, and the recordings contained the same contents at trial as when he had acquired them. The State did not need to prove that the recordings had been kept in a secure location. *See generally State v. Tatum*, 58 Wn.2d 73, 75, 360 P.2d 754 (1961) (stating that a photograph is authenticated when a witness, not necessarily the photographer, gives some indication as to when, where, and under what circumstances the photograph was taken and that the photograph accurately portray the subject illustrated); *Newman*, 4 Wn. App. at 593 (stating that “[t]he requirements for the admission of video-tapes

¹⁵ In dicta, our Supreme Court has suggested a more stringent test to authenticate a video tape that preserves “testimonial evidence,” such as the deposition of a complaining witness. *See State v. Hewett*, 86 Wn.2d 487, 492-93 n.4, 545 P.2d 1201 (1976).

¹⁶ Bjornstad testified that he kept the VHS tapes and receipts from the May 9 transaction in his field office in Auburn.

should be similar to those for photographs.”). Therefore, defense counsel was not deficient for failing to object to properly authenticated evidence.

III. Motion for Mistrial

Smith argues that the trial court erred by denying his motion for a mistrial. He contends that juror 5 committed misconduct by pressuring juror 9. He also argues that juror 9 was unfit for jury service because she experienced a “dilemma.” Appellant’s Br. at 37; 4 RP at 274. These arguments have no merit.

A trial court should grant a mistrial only when the “defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 713 (2000) (quoting *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). We review the trial court’s denial of a motion for a mistrial for abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A trial court abuses its discretion when it makes decisions based on untenable grounds or for untenable reasons. *See State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

Here, the record does not support Smith’s assertion that juror 5 pressured juror 9. Rather, juror 5 reported to the judicial assistant, apparently in the jury’s presence, that juror 9 was “not willing to go any further with deliberations.” 4 RP at 296. Juror 9 later told the judicial assistant privately that she was “being pressured” because of her position, but she did not single out any individual juror as the source of that pressure. 4 RP at 296. Individual jurors may at times feel pressure to change their positions during deliberations, but this is inherent in a process during which 12 relative strangers seek consensus on a defendant’s guilt or innocence.

The record also does not support Smith's claim that juror 9 was unfit to serve on the jury. Although she stated that she had a troubled conscience and expressed concern about a hung jury, she repeatedly stated that she could make a fair and impartial decision and could articulate her position to the other jurors. The trial court acted reasonably throughout the jury deliberation process and did not err by denying Smith's motion for a mistrial.¹⁷

We affirm the trial court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, A.C.J.

We concur:

Bridgewater, J.

Armstrong, J.

¹⁷ Smith argues that RCW 2.36.110 required the trial court to excuse juror 9 from jury service. That statute reads: "It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service." Here, the trial court did not believe that juror 9 manifested unfitness, so dismissal was not required. Smith's reliance on a Washington case that involved a sleeping jurors is misplaced.